

CONSIDERATIONS

UPON

Commissions ^{et}

OF

BANKRUPTS.

*Ea vera atque simplex Via est magistratum
Populo, non Creditori, gerere.*

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CONSIDERATION

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OF

BANKRUPT

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CONSIDERATIONS

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and lower Rank: And thereby to
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Commissions, &c.



THE Design of these Papers,
is to enquire in general, whe-
ther the Method of Proceed-
ing established under Com-
missions of Bankrupts, is not the most
reasonable and proper in the Case of In-
solvency, and upon the Whole benefi-
cial to the Publick; without entring into

a particular Examination of the several Acts of Parliament which establish this Method.

The common End of all the Laws relating to Bankrupts, is to discover and collect the Estate of the Debtor, in the best and speediest Manner, in order to make an equal Distribution of it among all the Creditors, in Proportion to every Man's Debt, without respect to the artificial Distinction of Debts of an higher and lower Nature : And this is the plain Justice of the Case, for it would be very unreasonable to allow a few of the most eager Creditors to run away with the whole Estate ; or to leave it in the Power of the Bankrupt himself, by confessing a Judgment, to give it up to which of them he pleases.

As this is the general Aim of all the Laws ; so the Method prescribed for this Purpose, is the most expeditious and effectual : And tho' summary Proceedings may be liable to Objections, as indeed there are Objections

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to every Thing ; yet in the Case of Insolvency, a short and immediate Remedy is the only one. For tedious and expensive Suits would waste and quite consume the Effects : Besides there would be Time to secrete the Estate, beyond all Possibility of Discovery. But, under a Commission, all that appears, or that can be found out to belong to the Debtor, is seized upon immediately, and secured for the Creditors, frequently before he can have had Leisure, or Opportunity to imbezil or conceal it ; which can be done by no other Process at the Suit of a Subject. The Bankrupt is obliged to make a Discovery of his Estate upon Oath, and that under the Penalty of his Life ; all other Persons also may be examined upon Oath, who are suspected to have any of his Effects in their Hands, or are supposed privy to, or acquainted with his Affairs : This is as effectual a Provision against Concealments, as is possible to be made ; which, by the Way, are much less frequent than losing Creditors

ditors are commonly apt to imagine. The Creditors are admitted to prove their Debts upon their own Oaths, producing their Notes, or other Securities, if they have any. If a Dispute arises upon a particular Debt, the Nature and Consideration of that Debt is examined into, and the Debt settled ; or if the Parties are not satisfied with that Determination, or indeed if any Difficulty whatsoever arises upon any Part of the Proceedings, there is Recourse to that natural and easy Remedy, a Petition to the Lord Chancellor, by which you have commonly in a Fortnight, the full Effect of a Chancery Suit : unless the Fact appears uncertain, or the Law doubtful, and then an immediate Trial is directed to determine it. In some Cases indeed a Bill in Chancery may be necessary ; but as soon as ever the Estate, or any considerable Part of it, can be gathered in, a Distribution is to be made : so that the Creditors, be they ever so many, may generally speaking, obtain all the Satisfaction

faction from their Debtor, which he is capable of making them, in as little Time as one only shall probably get the Effect of a Judgment upon a single Action. For, who ever sues an insolvent Man, will, in all Likelihood, have a long Chase: Such a Person being under a Necessity to make use of all possible Arts of Delay; and by such Contrivances, he may easily gain a Twelvemonth or more: and at last, perhaps, he shall surrender himself to Prison in Discharge of his Bail. Further, the Expence of a Commission, is to be born rateably by all the Creditors; and is reckoned to be about 60*l*. At Law, if the Debtor makes an obstinate Defence, one Action, and that possibly for no very great Debt, may occasion near as large an Expence as this is. And since the Number of Actions against an insolvent Trader, if there were no Commissions, must in general be nearly equal to the Number of his Creditors; it is very obvious how great, and yet how fruit-

fruitless and vain, the Expence of so many Suits must be.

With respect to the Creditors, therefore, this Method of Proceeding seems equitable and advantageous, and to be well contrived to obtain for them the most that they can have from an insolvent Man.

The next Thing to be considered, is the Case of the Debtor or Bankrupt: that is, whether the Indulgence and Mercy which the Law has of late shewn to insolvent Traders, is unreasonable; or upon the Whole, detrimental in its Consequences to the Publick.

The principal Benefit allowed to the Bankrupt, is a Discharge from his Debts, upon its being certified to the Lord Chancellor, that there appears no Reason to believe that he has not made an honest Discovery; and upon four Parts in Five in Number and Value of his Creditors, signing such Certificate, to testify their Consent to his Discharge.

The Humanity of this Provision, is and ought to be, a Prejudice in its Favour.

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This is a Power lodged, in effect, entirely in the Creditors, to be exercised meerly at their Discretion, who are in Truth, the only competent Judges, what Title the Man has to Favour; and if they don't think fit to consent to his Discharge, the Law leaves him, after all Examinations, to the Mercy of every single Creditor: But if this great Majority of the Creditors are satisfied to release him, then all that can be thought unreasonable in this Provision, is only this, that it is trusted in the Hands of Four Parts in Five of a poor Man's Creditors, to take away from the fifth Part, the Power of imprisoning for Life. A Power to be exercised very cautiously; and which is very unfit to be trusted to Persons, who are over-fond of it. For it ought to be considered, that the Confinement of a Man for Debt, does not depend so much on the real Desert of the Debtor, as on the Temper and Disposition of the Creditor; and surely it is not an unreasonable Presumption, that one

Creditor in Five may be a hard and unconscionable Man. But further, it will be allowed most certainly, that an honest Man, who, either by Losses, or a gradual Decay of his Trade, is reduced to the Condition of a Bankrupt, is a real and very proper Object of Compassion. Indeed, considering this Matter meerly in a political View, it is Wisdom in a Nation, whose Prosperity depends upon Commerce, that the Law should be as favourable as possible to unsuccessful Adventurers; and that there should not be insuperable Difficulties in the Way of a Man's setting up again: But till a Man is clear in the World, he is not in a Condition to be assisted by the few Friends he has left, and it is impossible for him to gain fresh Credit. It may, indeed, be objected, that every honest Man would be released by his Creditors, without a Commission: but this is by no Means true in Fact. For without considering how necessary the Appearance of Authority is, not only to bring People together, as often as there may

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may be Occasion, but also to cool and moderate the Warmth with which Creditors usually meet, and to compose them into a Temper to consider and judge of the Circumstances of the Case: To pass over these Things, how material soever they are; it is certain, Compositions seldom take Effect, either thro' the Obstinacy and Passion of some Creditors, or the downright Dishonesty of others, who will not come into any Terms, but upon some corrupt and private Bargain, unknown to the rest: which private Agreements will entangle the poor Man for ever, and likewise make it impossible for People, who would be otherwise ready to Trust him, to be satisfied whether he is really out of Debt, or not. And it is to restrain the Rigour of those inflexible and angry Creditors, and to defeat the little Cunning of these rapacious Ones, that the Law requires only the Consent of Four Parts in Five to a Man's Discharge. To this it must be added, that if by great Chance such an Agreement takes Effect, it seldom

ends without a Chancery Suit: for, how little soever Men may regard their Oaths under Commissions, where it is Death to be falsified; they certainly regard them less under these voluntary Agreements, where the Breach of them is not so much as Perjury.

If these Things are well considered, the Occasion that there is for some Provision of this Sort will appear; and the Reasonableness of it will be further manifest, by reflecting on the Numbers who are undone by becoming Bail for necessitous People, and the additional Expence of it, (how necessary soever that Security may be;) the Oppression of Bailiffs and Gaolers, (notwithstanding all the Care which is, or indeed can be taken to prevent it,) and the incredible private Hardships, and publick ill Consequences of Imprisonment. Let any one set before his Eyes the Condition of an honest Man, perishing in Confinement and Want, and unless his Distress can extort Compassion from his Creditors, without Hopes of
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Relief; and he can scarcely think that there is any immoderate Restraint laid upon the Severity of unrelenting Tem- pers. The Prejudice to the Publick by the Loss of the Industry, and Labour of such Numbers, as without this small Indulgence, must be imprisoned for Life, or fly the Kingdom, is too obvious to be insisted upon : but it cannot be improper to take Notice of the Contagion of a Gaol; how soon Persons grow there lost to all Sense of Reputation and Shame, how fast they improve in the lowest and most wicked Arts of Knavery and Cheating, and by what hasty Steps they become quite abandoned. These Evils are so shocking, and yet so common, that the Number merely of the Persons who obtain their Discharge under Commissions, is so far from being an Objection, that on the contrary the greater that Number is, so much stronger is the Argument in Favour of this Provision; unless the Rescuing Multitudes from the lowest and most wretched Condition Hu-
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man Nature can be reduced to, and Saving them from being a Curse to themselves, their Families, and the Nation, is to be esteem'd no good in it self, nor any Benefit to the Publick.

If there was any Occasion to say more, the *Beneficium Cessionis* of the Roman Law might be mentioned, by which a Debtor, who had not squandered away his Fortune in Riot and Prodigality; had it in his *own* Power to discharge *himself* out of Prison, or to avoid being thrown into it, by honestly surrendring up all his Estate to his Creditors.

But after all that has been, or can be said, of the Reasonableness and Humanity of this Indulgence; yet if the Consequences are found upon the Whole detrimental to the Publick, it is certain that it ought not to be allowed any longer.

The principal Inconvenience seems to arise from those Commissions, which are taken out by some Friend of the Bankrupt, merely upon the Prospect, and in
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Hopes of obtaining his Certificate, when he has but a very little Matter to deliver up to his Creditors ; or, as it sometimes happens, nothing at all. By Means of such a Commission, a Person shall be discharged without the Consent of his principal Creditors : sometimes without their Knowledge, an Advertisement in the *Gazette* being a very insufficient Notice to Creditors, who have no Suspicion of a Commission ; for the Man has been really broke perhaps so long, as to be forgot : or if they have Notice, the Contribution is so high, that it is not worth their while to come in ; and it is probably raised so high on Purpose to keep them out. This is in Effect Releasing a Man, whether his Creditors will or no : at best, that is, if the Chief Creditors prove their Debts, such a Commission is in that Case, nothing else than Levying a Tax upon them, to pay the Expence of their Debtor's Discharge.

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This is the fair State of the Case, and is indeed so great an Abuse, that unless it can be effectually remedied, such Commissions ought certainly to be prevented. But it should seem, that all these ill Consequences will be entirely removed, if, besides the Notice in the *Gazette*, the Bankrupt be obliged to deliver in upon Oath, a List of all his Creditors, and their Places of Abode, and Notice be sent to them; and all Creditors be allowed to prove their Debts, without paying Contribution, in order only to consent, or not, to his Certificate and Discharge; but not to vote for Assignees, or receive a Dividend, unless they pay Contribution. This will be a thorough Security, that no Person shall be discharged without the Knowledge and Approbation of his Creditors: and it will likewise throw the Expence of such a Commission, upon the Person who takes it out; which will be no Hardship. For, at present, in Cases where there are not Effects to answer the Charge, it is very well known, that the

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Contribution never does, nor is expected to defray the Expence, or any Thing like it: Or indeed, if it did, yet it is much more reasonable, that the Burden of a Commission taken out merely for the Benefit of the Bankrupt, and not at all of the Creditors, should be born rather by the Person who takes it out, than by the Creditors, who have lost enough already.

If then the Inconveniencies, which have been discovered to attend these Kind of Commissions, may be remedied; it will now come properly to be considered, whether the Case of a total Insolvency, is a Case which deserves to be provided for with this Indulgence. And not to repeat what has been said already of the Reasonableness of Certificates in general, which might be urged here with the strongest Force; the Short of the Matter is this, and no more: Among the Numbers who are reduced to this desperate Condition, there are some, (suppose them

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but few, yet there are certainly some,) who truly deserve Compassion and Relief. This Multitude therefore, ought not to be condemned, without Distinction to the Misery and Vices of a Prison: And a Commission, regulated as has been proposed, seems one of the best Ways which can be thought of, to distinguish the Unfortunate, from the Guilty. Compositions are in these Circumstances altogether impracticable, so that no Assistance can possibly be given these unhappy Men, but by a Commission. If therefore they can, among their Friends, raise Money enough to pay that Expence, which they may very often be able to do; it is no Sort of an Objection, that the Commission is taken out in Kindness to the Bankrupt, and with a View of his obtaining a Discharge from his Creditors, upon giving them Satisfaction, that he has really nothing, and how this entire Ruin was occasioned. For, what can the Creditors have further? except the

the Man's Person; and what Advantage will that be to them? tho' they will have even that in their Power. For this Provision is really little more than an Authority to call the Creditors together, (which in such a Case cannot be done without Authority,) to hear and consider what the Man has to offer for himself, before he is delivered over to perpetual Imprisonment; a Punishment which the Law of *England* inflicts on scarce any Criminal. And to these Considerations it may be added, that if, almost by Miracle, these unfortunate People escape a Gaol; yet being in a Condition not to be trusted, and urged by a Necessity beyond Relief, they would be in a Manner forced to become Cheats and Pick-pockets for a bare Subsistence.

The next Inconvenience, which may be objected to this Indulgence, is, that indeed, it is very fit that an honest Man in Misfortunes, should be treated with the utmost Tenderness; but that there

does not seem sufficient Distinction made between Persons who have been honest Men in their Dealings, and Knaves : A Distinction by all Means to be preserv'd. And it is no full Answer to say, that the Creditors have it in their Power to make this Distinction, because in Fact it is not made.

All this is very true, but the World in general does not sufficiently make the Distinction.

Almost all Arts of Gain are look'd upon with some Allowance ; therefore nothing more seems possible to be done, than that the Man's Behaviour in his Business should be examined into, as well as it can ; and if it appears, that he has been driving a Trade of Knavery, and any Acts of notorious and flagrant Dishonesty in his Dealings, can be fix'd upon him, he should not only not be discharged, but be prosecuted as a Cheat, and have some corporal and infamous Punishment inflicted on him.

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The last Objection, and which deserves indeed to be well considered, for it may be urged with great Force, is this,

That the true Occasion of so many Persons being reduced to Bankruptcy, is Negligence in their Accounts, and the Want of due Care and proper Frugality: That Carelessness and Extravagance are very fatal to the Publick, and often involve whole Families in Ruin: That these Vices are every Day growing upon us with the Luxury of the Age, and therefore all possible Care ought to be taken to discountenance and suppress them: But that this Indulgence of the Law, has rather a Tendency to encourage and cherish them, as it lessens both the Inconvenience and Shame, which ought always to attend the Persons who are guilty of them.

This, and much more, may be very reasonably urged; but the Objection has been in a great Measure obviated, by the

the Proposal to prevent Persons being discharged without the Consent of a real and very great Majority of all their Creditors, which will render it much less easy to obtain Certificates, than it has of late been. If any further Provisions can be thought of, to check the Progress of Luxury, and to oblige People to keep Accounts, and be better Economists in their Affairs; which shall effectually answer these good Ends, and which shall not treat all the various Degrees of Carelessness and Extravagance indiscriminately, and with the same Severity; and which shall make proper Allowances for the Mode of Living, which the World is run into; if such a Provision can be found out, it will be a very great Piece of Service to the Publick to propose it. But upon cool Examination, 'tis to be feared, this will appear to be much more difficult, than upon a slight View it may be imagined; and that all Things considered, no better Method can be taken, than

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to leave it, (after as particular an Enquiry into his Conduct as is possible,) to the Judgment of the Creditors, whether the Bankrupt has, upon the Whole, behaved so in this respect as to deserve their Favour: If not, the Law ought to deliver him up to their Mercy.

Thus it has been endeavoured to state the Nature of this Proceeding, and shew the Reasonableness of it in general. The Abuses to which it is liable have been fairly represented, and the most material Objections have been considered. There will always be Defects and Inconveniences in the wisest Institutions; but upon the whole Matter, this seems to be a Scheme of Justice very wisely designed, and equally well adapted to the unhappy Circumstances, both of the Creditors and the Bankrupt: It is founded on the justest Maxims, and tempered with the most proper Lenity. A Lenity which seems absolutely necessary, unless some general Jurisdiction could be formed,

ed, upon the Model of the Court of Conscience in the City of *London*, which like that, should have a Regard to the Circumstances and Family, the Ordinary gains; and necessary Expences of the Debtor, and consider what he could afford to pay Weekly towards the Discharge of his Debt.

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It is apprehended, that this Provision has been shewn to be so reasonable; that any further Proposals for rendering it more effectual will be received with Favour.

In Order to prevent the Abuse of Assignees keeping the Estate long in their Hands, sometimes till they break themselves, it is proposed, that they be obliged to account in all Cases, whether they have, or have not Effects, at the End of some reasonable Time, and unless any Effects are then standing out, to divide the Whole; but if there are, then to account onwards from Time to Time, till the whole Estate shall be distributed: with a Power to the Lord Chancellor to enlarge the Time as there may be Occasion. But since the Charge of Deeds of Distribution is very great, those Deeds may be quite taken away, and Dividends made by Warrant only without Fee; which Warrant should contain a List of the Creditors, and their

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Debts,

Debts, and be filed in some proper Office, to which the Creditors may have Recourse.

Since in the Case of Partners failing, there is occasioned great Expence and much Perplexity, by separate Creditors not being allowed to come in under a Joint Commission; because, 'tis said, that the Assignees of a Joint Commission can not recover the separate Debts; and therefore, merely in order to recover the separate Debts, there sometimes issue as many Commissions, as there are Partners, besides the Joint one: It is proposed, that in such Cases, one Joint Commission only should issue; under which an Assignment should be made, both of the Joint and several Effects and Debts, and the Assignees enabled to recover both, and Creditors of both Kinds admitted.

Whether the Conviction of Offenders for Concealment may not be made more easy; particularly, in Cases where a
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Man has furrendred himself, and submitted to be examined, and *finished his Examination without ever disputing his being a Bankrupt*; whether such Person, who has thus submitted, in order to take the Benefit of the Law, should not upon an Indictment be taken to be a Bankrupt, and to have had formal Notice to surrender; which Points are not the least material as to his Guilt or Innocence.

F I N I S.

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